MD AMIN MD YUSOF & ANOR

v.

CITYVILLA SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
LOW HOP BING J
[CIVIL APPEAL NO: 02-9-02]
27 MAY 2004

CIVIL PROCEDURE: *Pre-trial case management - Directions and orders - Peremptory order - Defendants failing to comply with directions of judge to file documents - Whether defendants' counterclaim should be struck out - Considerations - Whether plaintiff also failed to comply with directions - Whether there was 'wholesale disregard' of rules of court by defendants - Whether non-compliance intentional or contumelious - Ends of justice - Rules of the High Court 1980, O. 34*

CIVIL PROCEDURE: *Judgments and orders - Peremptory order - Pre-trial case-management directions - Defendants failing to comply with directions of judge to file documents - Whether defendants' counterclaim should be struck out - Principles and considerations - Whether there is a history of failures to comply with other orders of court - Whether 'ends of justice' would be met - Whether default intentional and contumelious - 'Unless order', whether an order of the last resort*

Pursuant to a pre-trial case-management conference on 24 September 2001, the learned judge directed the parties to file the following items: (i) bundle of pleadings; (ii) common bundle of documents divided into parts; (iii) statement of agreed facts; (iv) issues; and (v) statement of each party's case and the facts to be proved in relation to the issues. In this connection, the learned judge also made a peremptory order ('unless order') that any party which failed to comply with the directions would be precluded from prosecuting or defending its case, and that judgment would be entered in favour of the other party which complied with the directions. At the next case-management conference on 7 December 2001, the learned judge found the defendants to have defaulted in complying with his directions and, consequently, struck out their counterclaim and also forbade them from filing any document in support of their statement of defence without the leave of the court and/or the consent of the plaintiff (O. 34 r. 7 Rules of the High Court 1980 ('RHC')). Aggrieved, the defendant appealed to the Court of Appeal.

Held (allowing the defendants' appeal)
Per Nik Hashim JCA delivering the judgment of the court:

[1] Although a party's action or counterclaim may be struck out for non-compliance with a peremptory order of the court, such an order (striking out) will **not** be made **unless** there has been a history of failures to comply with other orders of court. A peremptory order (unless order) is an order of the last resort. Such an order will **not** meet the "ends of justice" if it results in a miscarriage of justice. The judge must look into all the circumstances of the case, including whether the default was intentional and contumelious, before proceeding to penalise the party in default. (p 94 c-d)

[2] In the present case, the learned judge had overlooked the fact that the plaintiff too was not beyond reproach. This was because it was not only the defendants who had failed to comply with the directions of the learned judge; indeed, both the plaintiff and the defendants had failed to file their respective statements of case as at 7 December 2001. This should have been taken into account in deciding whether it would be appropriate to strike out the defendants' counterclaim under O. 34 r. 7 RHC. Obviously, the decision of the learned judge was affected by this oversight. There was simply no reason why the court should be harsh to one party and be lenient to the other. (pp 93 a & 94 e-h)

[2a] There was no 'wholesale disregard' of the rules of court by the defendants. Indeed, the parties were still in the process of reaching an agreement respecting the documents to be filed, and the defendants' failure to comply with the directions of the learned judge was neither intentional nor contumelious. Counsel for the defendants was also not given an opportunity to reply to the plaintiff's application to strike out the counterclaim. The decision of the learned judge was, as a result, fatally flawed and wrong in principle; it was not in keeping with meeting the "ends of justice". (p 95 b-d)

[Order of learned judge set aside; case remitted to High Court for further case management.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Berikutan satu perundingan pengurusan kes pra-perbicaraan yang diadakan pada 24 September 2001, yang arif hakim telah mengarahkan pihak-pihak untuk memfail perkara-perkara berikut: (i) ikatan pliding; (ii) ikatan dokumen bersama yang dibahagi kepada bahagian-bahagian; (iii) penyata fakta yang dipersetujui; (iv) isu-isu; dan (v) penyata kes setiap pihak serta fakta yang hendak dibuktikan dalam hubungan dengan isu-isu. Sehubungan itu, yang arif hakim juga telah membuat perintah peremptori ('perintah melainkan') bahawa mana-mana pihak yang gagal mematuhi arahan akan dihalang dari meneruskan dakwaan atau pembelaannya, dan bahawa penghakiman akan diberi kepada pihak yang mematuhi arahan. Di perundingan pengurusan kes berikutnya pada 7 Disember 2001, yang arif hakim mendapati bahawa defendan telah mengingkari arahannya dan, dengan itu, telah mengetepikan tuntutan balas defendan serta menghalang mereka dari memfail sebarang dokumen bagi menyokong penyata pembelaan mereka tanpa kebenaran mahkamah dan/atau persetujuan plaintif (A. 34 k. 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT')). Terkilan, defendan merayu ke Mahkamah Rayuan.

Diputuskan (membenarkan rayuan defendan)
Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

[1] Walaupun tindakan atau tuntutan balas suatu pihak boleh diketepikan atas alasan ketidakpatuhan terhadap perintah peremptori mahkamah, perintah seperti itu (pengetepian) tidak boleh dibuat melainkan terdapat suatu rentetan kegagalan untuk mematuhi perintah-perintah mahkamah. Suatu perintah peremptori (perintah melainkan) adalah perintah yang dibuat sebagai usaha terakhir. Perintah sedemikian tidak akan memenuhi "matlamat keadilan" jika ia mengakibatkan salah laksana keadilan.

[2] Dalam kes semasa, yang arif hakim telah tidak memperdulikan fakta bahawa plaintif juga tidaklah sunyi dari kesilapan. Ini kerana bukan defendan sahaja yang gagal mematuhi arahan-arahan yang arif hakim; kedua-dua plaintif dan defendan malah telah gagal memfailkan penyata kes masing-masing setakat 7 Disember 2001. Ini harus diambil kira dalam menentukan sama ada ianya wajar untuk mengetepikan tuntutan balas defendan di bawah A. 34 k. 7 KMT. Jelas bahawa keputusan yang arif hakim telah dijejas oleh ketidakpedulian ini. Tidak ada sebab mengapa mahkamah harus bertindak keras terhadap satu pihak dan berlembut dengan pihak yang lain.

[2a] Tidak terdapat 'ketidakpedulian sepenuhnya" terhadap kaedah-kaedah mahkamah oleh defendan. Malah, pihak-pihak masih lagi dalam proses untuk mencapai persetujuan berkaitan dokumen-dokumen yang hendak difail, dan kegagalan defendan untuk mematuhi arahan yang arif hakim bukanlah disengajakan atau dengan tujuan menghina. Peguam defendan juga tidak diberi peluang untuk menjawab permohonan plaintif bagi mengetepikan tuntutan balas. Keputusan yang arif hakim, dengan itu, adalah cacat secara yang memudaratkan dan salah di segi prinsipnya; ianya tidak selari dengan tujuan memenuhi "matlamat keadilan".

[Perintah yang arif hakim diketepikan; kes dikembalikan ke Mahkamah Tinggi untuk pengurusan kes selanjutnya.]

Case(s) referred to:

Hytec Ltd v. Coventry City Council [1997] 1 WLR 1666 ***(refd)***

In re Jokai Tea Holdings Ltd (Note) [1992] 1 WLR 1196 ***(refd)***

Lee Mun Tuck v. Tan Chin Kah & Anor [1991] 1 CLJ 631; [1991] 4 CLJ (Rep) 929 HC ***(refd)***

Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC ***(refd)***

Transcom Rand (M) Sdn Bhd v. MARA Holdings Sdn Bhd [2002] 6 CLJ 492 HC ***(refd)***

United Malayan Banking Corp Bhd v. Palm and Vegetable Oils (M) Sdn Bhd [1994] 3 CLJ 144 SC ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 34 r. 7

For the appellants/defendants - Joginder Singh (Shahareen Begum); M/s Imran, Shahareen & Co

For the respondent/plaintiff - Tee Geok Hock (N Rajentharan); M/s GH Tee & Co

Reported by Gan Peng Chiang

JUDGMENT

Nik Hashim JCA:

Background

On 24 September 2001, the learned judge, in the course of his pre-trial case management conference with solicitors for the parties pursuant to O. 34 of the Rules of the High Court 1980 (the RHC), directed the parties to file the following by 24 November 2001:

(a) bundle of pleadings;

(b) common bundle (s) of documents divided into parts;

(c) statement of agreed facts;

(d) issues;

(e) statement of each party's case and facts to be proved in relation to issues.

and also made a peremptory or an 'unless order' which reads:

> if any party defaults in complying with the above directions, it/he will be precluded from prosecuting/defending its/his case and judgment will be given in favour of the party complying with the above directions.

The learned judge then fixed 7 December 2001 for the court to ascertain compliance with its directions and for further directions.

On 7 December 2001, upon finding that the appellants (the defendants in the court below) have failed to comply with the directions, the learned judge struck out with costs the appellants' counterclaim and forbade them from filing any document in support of their statement of defence without the leave of the court and or consent of the respondent (the plaintiff in the court below).

In making the orders, the learned judge said this:

> The provisions of Order 34 of the Rules of the High Court 1980 are not intended to be a dead letter to merely embellish the Rules without any teeth. It is clear that the defendants have been tardy in compliance with the court's directions on 24/9/01, despite having been put on notice of the penalty that will follow for non-compliance. No attempt was made by the defendants to ask for the plaintiff's bundles although Encik Pari has said the defendants wanted to look at the plaintiff's bundle first.
>
> In these circumstances, I am of the view that this is a proper case where the court would be properly exercising its powers to invoke Order 34 rule 7 of the Rules of the High Court 1980 to enter judgment for the plaintiff on its claim and strike out the defence and the counterclaim. However, since counsel for the plaintiff is only seeking to bar the defendants from pursuing their counterclaim, I hereby order that the counterclaim be struck off with costs and that the defendants pay the costs of today's proceedings to the plaintiff. The defendants are also precluded from filing any documents in support of the defences from here on without the consent of the plaintiff or the approval of the court.

It is pertinent to note that on 7 December 2001 both parties failed to file their respective statements of case as required under para. (e) of the directions.

The records showed that the respondent's claim and the appellants' counterclaim arose from the sale of the appellants' shares in a company known as Alfa Lagenda Sdn Bhd to the respondent pursuant to an agreement dated 20 September 1994.

According to the agreement the purchase price of RM13,000,000 was agreed to be paid by the respondent to the appellants in the following manner:

(i) RM3,000,000 upon execution of the agreement;

(ii) RM3,700,000 upon execution of a privatization agreement between Alfa Lagenda and State Government of Johor; and

(iii) RM9,000,000 within three years of execution of the privatization agreement.

The privatization agreement was executed on 28 March 1995 but the balance purchase price of RM9,000,000 was not paid. The respondent's claim is based on the alleged breaches and or frustration of the agreement by the appellants and as a result the respondent claimed that it had suffered loss and damage.

Appeal

It is the submission of learned counsel for the appellants that the learned judge had exercised his discretion on wrong principles and caused a miscarriage of justice. Learned counsel for the respondent however, maintained that the failure to comply with a peremptory order is serious and submitted that the learned judge was right in his decision.

Decision

The procedures and powers of the High Court in pre-trial case management are provided under O. 34 of the RHC which came into force on 22 September 2000 *vide* PU (A) 342/2000, and they are so provided so that the action could be brought to trial within time. The significance of the case management procedure needs no emphasis. If emphasis is still needed then reference may be made to the recent Federal Court case of *Tan Geok Lan (P) v. La Kuan* [2004] 2 CLJ 301 where Mohd Noor Ahmad FCJ at p. 312 said:

> The significance of this procedure is that it marks a change from the traditional position under which the progress of cases was left largely in the hands of the parties. Now, under the procedure the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused.

Whereas r. 7 of this Order states:

> If any party to an action fails to comply with any direction given by the Judge at any pre-trial conference, such order may be made against the defaulting party by the judge as meets the ends of justice.

Order 34 r. 7 provides for the discretionary power of the judge to make such order against the defaulting party "as meets the ends of justice" should any party fail to comply with any direction given by the judge at any pre-trial case management conference.

Whilst it is true that a party's action or counterclaim could be struck out for non-compliance with a peremptory or an unless order of the court, the order would not be made unless there is a history of failure to comply with other orders. A peremptory or an unless order is an order of last resort (see *Hytec Ltd v. Coventry City Council* [1997] 1 WLR 1666 at p. 1674 para H). Surely, it would not meet the ends of justice if the order made results in a miscarriage of justice. Therefore, all the circumstances of the case, inclusive of whether the failure to comply with the peremptory or unless order was indeed intentional and contumelious, should be looked at by the judge before penalizing the defaulting party (see *In re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 1196 CA).

In the instant case, the learned judge overlooked the fact that the respondent too was not free from fault in that it also failed to comply with para. (e) of the learned judge's directions. This failure is certainly a factor which must be taken into account in considering whether the striking out order is an appropriate one under O. 34 r. 7 of the RHC.

In *United Malayan Banking Corp Bhd v. Palm and Vegetable Oils (M) Sdn Bhd* [1994] 3 CLJ 144 Mohamed Dzaiddin SCJ (as he then was) had occasion to observe:

> ..., the learned judge overlooked the fact that the respondent themselves have yet to file their list of documents within the stipulated period under the order of the senior assistant registrar in the summons for directions. This is certainly a factor to be taken into account as to whether the respondents have contributed to the delay.

Such an oversight on the part of the learned judge, to our mind, had adversely affected his decision in entertaining the respondent's application to strike out the appellants' counterclaim. Since the respondent and the appellants are equally at fault, we see no good reasons why the court should be more harsh towards the appellants than the respondent. The court should not favour any one party

and justice would demand that the case be allowed to proceed (see *Lee Mun Tuck v. Tan Chin Kah & Anor* [1991] 1 CLJ 631; [1991] 4 CLJ (Rep) 929; *Transcom Rand (M) Sdn Bhd v. MARA Holdings Sdn Bhd* [2002] 6 CLJ 492).

Besides, there was no wholesale disregard of the rules of the court by the appellants. The appellants were still in the process of trying to reach an agreement with the respondent over the documents to be filed. From the records and the explanations given by the appellants we found that the appellants' failure to comply with the directions was not intentional or contumelious justifying the drastic action taken by the learned judge. Moreover, there was no record to show that learned counsel for the appellants was ever afforded an opportunity to reply to the respondent's application for the striking out of the appellants' counterclaim. In this case, the learned judge proceeded straight to strike out the appellants' counterclaim soon after hearing the submission of learned counsel for the respondent. In our judgment, his decision was thus fatally flawed and wrong in principle which had resulted in an injustice to the appellants who have been deprived of their right to have their counterclaim heard on its merit. The learned judge's decision does not meet the ends of justice.

We are of the view that under the circumstances, this was a fit and proper case for interference by this court. Accordingly, we allowed the appeal with costs in the cause and set aside the order of the learned judge and remitted the case to the High Court for further case management. The deposit paid into court shall be refunded to the appellants.